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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1230

SOUTHERN PACIFIC COMPANY, *Petitioner,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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No.

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v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on October 6, 1967.

Opinions Below

The opinions of the District Court, set forth in Appendices D and F hereto, pp. 9a-12a, 14a-17a, *infra*, are reported at 253 F. Supp. 532 and 255 F. Supp. 290. The opinion of the Court of Appeals, set forth in Appendix G hereto, pp. 18a-20a, *infra*, is not yet officially reported but is unofficially reported at 56 CCH Lab. Cas. ¶ 12,209.

Jurisdiction

The judgment of the Court of Appeals, set forth in Appendix H hereto, p. 21a, *infra*, was entered October 6, 1967.

A timely petition for rehearing was denied by the order and memorandum of the Court of Appeals set forth in Appendix I hereto, pp. 22a-23a, *infra*, on December 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether a district court that enters judgment upon a railway labor arbitration award pursuant to Section 9 of the Railway Labor Act (45 U.S.C. § 159) has jurisdiction to determine individual employees' claims and grievances arising from alleged misapplications of the award, where those claims and grievances (1) have not been handled in accordance with the grievance procedure established by the parties' collective bargaining contract and (2) have not been referred to an adjustment board under Section 3 of the Railway Labor Act (45 U.S.C. § 153).

Statutes Involved

The statutes involved are Sections 3 and 9 of the Railway Labor Act (45 U.S.C. §§ 153, 159). The relevant parts of Sections 3 and 9 are printed in Appendix A hereto, pp. 1a-5a, *infra*.

Statement

This case concerns the power of a court to entertain claims and grievances of individual railroad employees arising from alleged misapplications of an arbitration award, without requiring the claimants to utilize the parties' grievance procedure or to submit their claims to an adjustment board under Section 3 of the Railway Labor Act (45 U.S.C. § 153).

Petitioner railroad and respondent union are parties to a 1948 collective bargaining contract between most of the nation's railroads and three railway labor organizations,

which established a procedure for the handling of *all* claims and grievances. The agreement provided that "all claims or grievances arising on and after November 1, 1948 . . . must be presented in writing . . . to the officer of the company authorized to receive same, within sixty days from the date of the occurrence on which the claim or grievance is based"; provided further for appeals from the disallowance of any such claim or grievance to higher carrier officials; and provided finally for appeals from the decision of "the highest [carrier] officer designated to handle claims and grievances" to any "tribunal having jurisdiction pursuant to law or agreement of the claim or grievance involved." The agreement prescribed the time within which each step of the grievance procedure had to be taken, provided that claims not disallowed by the carrier within the time allowed for such action "shall be considered valid and settled accordingly," and provided that disallowed claims not appealed within the time allowed for appeals "shall be barred" and the matter deemed "closed" (J.A. 266). The agreement remains in effect today (J.A. 255, 273).[1]

In 1959 petitioner and most of the nation's railroads served respondent and other unions with notices under Section 6 of the Railway Labor Act (45 U.S.C. §156) proposing changes in various collective bargaining contracts including the National Diesel Agreement, which required the railroads to assign firemen to virtually all locomotives. In 1963 the resulting dispute threatened to erupt in a nationwide railroad strike. To prevent such a disaster, Congress enacted P.L. 88-108, 77 Stat. 132. That law submitted the firemen's dispute to arbitration "pursuant to sections 7 and 8 of the

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[1] Petitioner and respondent also are parties to a 1949 agreement which established a joint committee to which "any dispute or controversy arising on any carrier as to interpretation or application of any of the terms of the [1948] Agreement. . . shall be referred . . . for decision" (J.A. 288).

Railway Labor Act," provided that the arbitration award "shall be made and filed as provided in said sections and shall be subject to section 9 of said Act," and designated the United States District Court for the District of Columbia "as the court in which the award is to be filed" (P.L. 88-108, §4).

On November 26, 1963, Arbitration Board No. 282—the board established pursuant to P.L. 88-108—rendered its Award. The Award (J.A. 5-12) modified the National Diesel Agreement to permit the gradual elimination of firemen's positions. It did not establish any procedure for handling individual claims or grievances arising from the implementation of its provisions and did not purport to modify the parties' grievance procedures. Instead, it provided that "all agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen . . . shall continue undisturbed except as modified by the terms of this Award" (J.A. 5). The Board has ruled that this means that the Award did not restrict application of the parties' usual grievance procedures (J.A. 14-17).

Following an unsuccessful attempt by respondent to impeach the Award, *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C.), *aff'd*, 331 F. 2d 1020 (D.C. Cir. 1964), the District Court entered judgment upon it in accordance with Section 9 of the Railway Labor Act (45 U.S.C. §159). The judgment established that the Award was "conclusive on the parties as to the merits and facts of the controversy" (45 U.S.C. §159 Second), providing simply, in the language of Section 9, that "judgment is hereby entered on the arbitration award . . . which judgment is final and conclusive upon the parties" (J.A. 13, p. 6a, *infra*).

Following the entry of judgment upon the Award, respondent threatened a strike over disputes that arose as to its meaning and application. Such a strike would have been

unlawful because Sections 7 Third (c) and 8(m) of the Railway Labor Act (45 U.S.C. §§157 Third (c), 158(m)) commit such disputes to the Arbitration Board for resolution.[2] Compare *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957). Accordingly, the carriers sought relief in the proceeding in which the judgment had been entered, and the District Court enjoined the strike (J.A. 18-19, pp. 7a-8a, *infra*). *In re Certain Carriers*, 229 F. Supp. 259 (D.D.C. 1964). The court did not condition its injunction on preservation of the *status quo* pending rulings by the Board because (in the words of the Court of Appeals) that "would have been a *de facto* suspension of [the Award] at variance with the spirit of the Act" (p. 19a, *infra*; 229 F. Supp. at 260). However, the court stated that if, like the union, the railroads refused to comply with the Award, the court "would not tolerate such . . . defiance and would compel them to comply" (229 F. Supp. at 261). Accordingly, the court reserved jurisdiction for any party "to apply to this Court . . . for such further orders as may be necessary or appropriate for the construction, carrying out or enforcement of this order or of the judgment heretofore entered in this proceeding upon the Award . . ., or any legal obligation resulting therefrom" (J.A. 19, p. 8a, *infra*).

Petitioner was among the railroads on which disputes arose as a result of the implementation of the Award. One such dispute arose from petitioner's failure during a 27-day period in September 1964 to assign firemen to the crew of an engine known as "Orange Switcher No. 2," which petitioner had inadvertently omitted from an interim listing

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[2] *Western Air Lines* v. *Labor Commissioner*, 167 F. 2d 566 (9th Cir. 1948); *Brotherhood of Railroad Trainmen* v. *Missouri Pac. R. Co.*, 230 F. Supp. 197 (E.D. Mo. 1964); *Brotherhood of Railroad Train.* v. *Chicago, M., St. P. & P. R. Co.*, 345 F. 2d 985 (D.C. Cir. 1965); *Brotherhood of Railroad Trainmen* v. *Certain Carriers*, 349 F. 2d 207 (D.C. Cir. 1965); *Brotherhood of Rail. Train.* v. *Terminal R. Ass'n*, 380 F. 2d 584 (D.C. Cir. 1967).

of crews not requiring firemen which it served on respondent pursuant to the Award (J.A. 6-7, 162-163, 213-216, 256-258, 284-286). Because of the omission, the National Diesel Agreement remained applicable to Orange Switcher No. 2 and consequently was violated by petitioner's failure to assign firemen to the crew. See *Brotherhood of Railroad Trainmen* v. *Akron & B.B.R. Co.*, 385 F. 2d 581, 608-612 (D.C. Cir. 1967). Another dispute arose from petitioner's failure during 1964 to assign firemen to crews that occasionally "borrowed" road locomotives not equipped with "deadman controls" to perform certain yard switching operations (J.A. 150-154, 208-211, 252-255, 278-282). The Award provided that "no *yard* locomotive" not equipped with a deadman control should be operated without a fireman (J.A. 7), but contained no similar provision applicable to *road* locomotives used in "yard or industrial switching" (J.A. 14). Consequently, petitioner believed (and still believes) that it had no obligation to assign firemen to these crews (J.A. 208, 278-279, 282-283).

At the time of these events, respondent presented numerous claims for compensation to petitioner, on behalf of individual firemen who claimed that they should have been assigned to Orange Switcher No. 2 and to yard crews that used road locomotives not equipped with deadman controls. These claims were presented within the time and in the manner prescribed by the parties' 1948 grievance procedure agreement. Initially, petitioner disallowed the claims at each level of the grievance procedure. However, respondent filed a motion (J.A. 20-26) seeking redress in the proceeding in which the judgment and the injunction had been entered by the District Court. Petitioner was of the view that the motion sought relief beyond the court's power to grant and that the deadman control claims were entirely without foundation. Nevertheless, petitioner instructed its officials to stop the practices that had given rise to the claims and paid the

timely claims in order to dispose of the matter without further contention. That disposed of the motion with respect to the two groups of claims (J.A. 21, 23-24, 150-154, 174-177, 208-211, 213-216, 238, 244, 253-254, 256, 258, 279-280, 283, 285).

However, in May of 1965, respondent presented a number of additional claims to petitioner based on the occurrences that had given rise to the claims which petitioner had already paid. Unlike the paid claims, these later claims either were not presented or were not appealed within the time prescribed by the parties' grievance procedure (J.A. 278-286). Time was important, at least as regards the deadman control claims, because petitioner had no written records on which to base a determination of the relevant facts (J.A. 282, 284). Accordingly, petitioner refused to pay the untimely claims on the ground that they were barred by the 1948 grievance procedure agreement (J.A. 252-259, 278-286).

This litigation followed. On December 1, 1965, respondent filed a motion for further relief at the foot of the District Court's decrees, seeking redress for the untimely claims which petitioner had refused to pay and for two additional claims which had not been presented before (J.A. 245-248, 254-255, 256, 258, 280-281, 283, 285-286). Petitioner opposed the motion on the ground that the requirements of the parties' grievance procedure had not been satisfied, and on the further ground that under Section 3 of the Railway Labor Act (45 U.S.C. §153) exclusive jurisdiction of such claims following exhaustion of grievance procedures lies with adjustment boards (J.A. 272-287).

The District Court granted respondent's motion. It based its ruling on its own interpretation of the parties' 1948 contract—"If this language is construed literally, the claims here presented would be subject to the provisions" of the contract, but "the parties could not have had in contemplation the possibility of a compulsory arbitration sometime in

the future terminating in a judgment of the court''—and, alternatively, on the theory that whatever its intended scope, the 1948 contract could ''not oust the court of jurisdiction to determine a claim arising subsequently''—a jurisdiction derived from the court's duty ''of enforcing'' its judgment ''confirming the Award'' (J.A. 322-323, pp. 10a-11a, *infra*). Accordingly, the court entered an order requiring petitioner to honor the claims without regard to the requirements of the parties' grievance procedure or Section 3 of the Railway Labor Act (J.A. 329, p. 13a, *infra*).

On appeal, the Court of Appeals affirmed. Unlike the District Court, it did not undertake to resolve the parties' differences with respect to the interpretation of the 1948 contract—something that only the adjustment boards have the power to do.[3] Instead, the Court of Appeals assumed (without deciding) that the claims involved in the case are within the scope of the 1948 contract and Section 3 of the Railway Labor Act. Nevertheless, it held, the District Court had jurisdiction to determine the claims as an incident of its power to enforce its decrees (*i.e.*, the judgment on the Award) and to condition injunctive relief (pp. 19a-20a, *infra*):

> ''. . . On the petition of the railroads the court has enforced the award against the union. . . . It likewise has jurisdiction to enforce the award against the railroads. The railroads, like the unions, are subject to the court's power to enforce its own decrees.

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[3] Disputes as to the interpretation of the 1948 contract should be referred to the joint committee to which the parties have agreed (see p. 3, n. 1, *supra*) and in any event are disputes as to the "interpretation or application of agreements" (45 U.S.C. § 153 First (i)) and are therefore within the adjustment boards' exclusive jurisdiction under Section 3 of the Railway Labor Act. See *Gunther* v. *San Diego & A.E.R. Co.*, 382 U.S. 257, 260-262 (1965); *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548 (1959); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950); *Order of Conductors* v. *Pitney*, 326 U.S. 561 (1946).

"The general power of an equity court to impose conditions on those who seek equitable relief exists where an injunction is sought to enforce the provisions of the Railway Labor Act. *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U.S. 528 (1960). . . .

". . . Even assuming, but by no means deciding, that the carriers are right that these claims are minor disputes for which the contract provided a usual procedure within Section 3 of the Railway Labor Act, the District Court did not abuse its discretion in establishing a condition that employees injured by misapplication of the award have available a judicial remedy, and do not have to wait years for Adjustment Board vindication" (footnotes omitted).[4]

For reasons stated below, petitioner seeks review of that ruling.

Reasons for Granting the Writ

1. This case presents the question whether individual railroad employees' claims and grievances arising from alleged misapplications of an arbitration award must be handled like other claims and grievances under the Railway Labor Act—in accordance with the parties' grievance procedure followed by reference to an adjustment board under Section 3 of the Act (45 U.S.C. §153)—or whether instead such claims and grievances may be determined by the court that enters judgment upon the award pursuant to Section 9 of the Act (45 U.S.C. §159). That question may well be the most important question not yet decided by this

[4] Some months prior to the decision below, Section 3 of the Railway Labor Act (45 U.S.C. § 153) was amended so that it is no longer necessary "to wait years for Adjustment Board vindication" in *any* case, including cases pending on the date of the amendments. See P.L. 89-456, 80 Stat. 208 (1966); pp. 1a-3a, *infra*.

Court as to procedures applicable to railroad employees' claims and grievances.

Under the Railway Labor Act, the rules that govern employees' rights are established by "agreements" as to "rates of pay, rules, or working conditions" (45 U.S.C. §§ 152 First, Seventh, 153 First (i), 156). The Act provides detailed procedures for the settlement of disputes over both the *making* and the *application* of such "agreements." These disputes are known, respectively, as the "major and the minor disputes of the railway labor world." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723 (1945).

Major disputes are governed primarily by Sections 5 through 10 of the Act (45 U.S.C. §§ 155-160). Section 6 of the Act (45 U.S.C. § 156) requires unions and railroads to give thirty days' written notice of intended changes in "agreements affecting rates of pay, rules, or working conditions" (45 U.S.C. § 156). Following the service of such a notice, the parties must negotiate, first in conferences and then with the assistance of the National Mediation Board, in an attempt to reach agreement (45 U.S.C. §§ 152 First, 155, 156). If that fails to settle the matter, the Mediation Board must proffer arbitration under Section 5 First of the Act (45 U.S.C. § 155 First). If the parties agree to arbitrate, the arbitration is conducted under Sections 7 and 8 of the Act (45 U.S.C. §§ 157, 158), and the board's award is filed in court, which enters judgment upon it unless it sets it aside, pursuant to Section 9 of the Act (45 U.S.C. § 159). If the parties do not agree to arbitrate, the Mediation Board terminates its services (45 U.S.C. § 155 First). Thirty days later the parties may use self-help to achieve their objectives, subject to the President's power to appoint an emergency board under Section 10 of the Act (45 U.S.C. §§ 155 First, 160). *See Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

Thus, major dispute arbitrations under Sections 7-9 of the Act are part of the "contract-making" process. Lester B. Schoene, counsel, Railway Labor Executives Association, *Hearings on H. R. 706 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare,* 89th Cong., 2d Sess., pp. 40-41 (1966). That is, under the statutory major dispute procedures, rules may be established either by agreement or arbitration. Either way, the rules so established become a part of the parties' "agreements affecting rates of pay, rules, or working conditions" (45 U.S.C. § 156), subject to further change only by agreement or pursuant to the statutory major dispute procedures. *Brotherhood of Railroad Trainmen* v. *Akron & B. B. R. Co., supra; Manning* v. *American Airlines,* 329 F. 2d 32 (2d Cir. 1964).

Once the rules have been established, the "minor" disputes that arise with respect to their application are governed primarily by Section 3 of the Act (45 U.S.C. § 153).[5] Under Section 3 First (i), "the disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" (45 U.S.C. § 153 First (i)). Following exhaustion of that procedure, either party may refer the dispute for final determination to the

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[5] Under Sections 5 Second, 5 Third (d), 7 Third (c) and 8 (m) of the Act (45 U.S.C. §§ 155 Second, Third (d), 157 Third (c), 158 (m)), the National Mediation Board determines disputes as to the meaning of mediation agreements, and arbitration boards likewise determine disputes as to meaning of their awards. But these tribunals have no power to determine individuals' claims and grievances arising from the application of agreements and awards—a matter governed by Section 3. See 45 U.S.C. § 155 Third (d); *Thirty-Third Annual Report of the National Mediation Board,* p. 60.

National Railroad Adjustment Board, or to a system board of adjustment established by agreement, or to a special board of adjustment appointed pursuant to the 1966 amendments of Section 3 (45 U.S.C. § 153 First (i), Second; P.L. 89-456). In short, under Section 3, individuals' claims and grievances must be handled in accordance with the parties' grievance procedure and then are subject to compulsory grievance arbitration by an adjustment board. See *Trainmen* v. *Chicago R. & I. R. Co., supra,* at 35-39; *Walker* v. *Southern R. Co.,* 385 U.S. 196, 198 (1966).

This Court has held repeatedly that the procedures prescribed by Section 3 constitute "a mandatory, exclusive, and comprehensive system for resolving grievance disputes," *Locomotive Engrs.* v. *L. & N. R. Co.,* 373 U.S. 33, 38 (1963); *Gunther* v. *San Diego & A.E.R. Co.,* 382 U.S. 257, 264 (1965), and therefore that claims and grievances to which Section 3 applies—claims and grievances within an adjustment board's jurisdiction—may not be determined by the courts. *Pennsylvania R. Co.* v. *Day,* 360 U.S. 548 (1959); *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U.S. 239 (1950); *Order of Conductors* v. *Pitney,* 326 U.S. 561 (1946). "Since the Board has jurisdiction, it must have exclusive primary jurisdiction." *Pennsylvania R. Co.* v. *Day, supra,* at 552.

This case concerns individual employees' claims for compensation—grievances—that arose from alleged misapplications of the rules established by the Award by Board 282. Petitioner contends that the claims should have been handled in accordance with the grievance procedure established by the parties' 1948 contract, that following exhaustion of that procedure the claims should have been referred to an adjustment board under Section 3, and therefore, that the District Court lacked jurisdiction of the claims under the rule of *Day, Slocum* and *Pitney.* The court below held, however, that "even assuming . . . that the carriers are right

that these claims are minor disputes for which the contract provided a usual procedure within Section 3 of the . . . Act," nevertheless the District Court could determine the claims as an incident of its undoubted power "to enforce its own decrees"—*i.e.*, to "enforce the award against the railroads." Thus, the court below justified the departure from the rule of *Day*, *Slocum* and *Pitney* on the ground that the District Court could determine the claims as an incident of its power to enforce the judgment entered pursuant to Section 9 of the Act.[6] Accordingly, the case squarely presents the question whether claims and grievances arising from alleged misapplications of rules established by an arbitration award are subject to the procedures applicable to other claims and grievances, or whether instead they may be determined by the court that enters judgment upon the award pursuant to Section 9.

This is an appropriate case in which to decide that question. The Award by Board 282 is the most important arbitration award in the history of the industry. It does not differ in any material way from other Railway Labor Act arbitration awards. To be sure, the arbitration was ordered by the Congress. But by command of the Congress, Board 282 made a "complete and final disposition" of a major dispute over changes in agreements (such as the National Diesel Agreement) proposed in notices served under Section 6 (P.L. 88-108, § 3). Thus, like other arbitration awards disposing of major disputes, the Award by Board 282 effected changes in "agreements affecting rates of pay, rules, or

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[6] The Court of Appeals also stated that the District Court could make a judicial remedy available as a condition of its injunction against strikes by respondent. However, for reasons stated at pp. 19-20, *infra*, we do not understand that to mean that the District Court could have conditioned its injunction in that fashion in the absence of jurisdiction to determine the claims as an incident of its power to enforce its judgment entered pursuant to Section 9. Whether such jurisdiction exists under Section 9 is the question presented.

working conditions" within the meaning of Section 6. *Brotherhood of Railroad Trainmen* v. *Akron & B. B. R. Co., supra.* By command of the Congress, the arbitration was "conducted pursuant to sections 7 and 8 of the . . . Act," and judgment was entered upon the Award pursuant to Section 9 of the Act (P.L. 88-108, § 4). Thus, the judgment involved in this case had the effect of any judgment entered pursuant to Section 9. Moreover, the two groups of claims involved in this case are typical of the kinds of claims and grievances that might arise from the implementation of any arbitration award disposing of a major dispute (see pp. 5-6, *supra*).

2. The question presented warrants review by this Court. As stated above, railroad work rules are established in two ways under the Railway Labor Act, by contract or arbitration. Thus, the decision below removes an obviously important category of claims and grievances arising from the application of such rules from the "mandatory, exclusive, and comprehensive system for resolving grievance disputes," *Locomotive Engrs.* v. *L. & N. R. Co., supra,* prescribed by Section 3. The record demonstrates the importance of such a decision in concrete terms. It shows that nearly a thousand claims arose from the application of the Award by Board 282, on a single carrier, in a little less than a year (J.A. 27-172). The Award by Board 282 applied to over 160 different railroads, it remained in effect for two years, and respondent's briefs in the court below mentioned countless similar claims against other railroads. The Award by Board 282 was not the first railway labor arbitration award —Board 282 was so numbered because it was the 282nd arbitration board established under the Act—nor is it the last such award.[7] Unless the decision below is reviewed by

[7] As of June 30, 1967, Arbitration Board No. 295 had rendered its Award. *Thirty-Third Annual Report of the National Mediation Board,* p. 46. Most arbitrations under Sections 7-9 of the Railway Labor Act settle major disputes as to "the making of agreements." Lester B. Schoene,

this Court, it will stand as a precedent applicable to all claims and grievances arising from alleged misapplications of awards establishing work rules made by these many railway labor arbitration boards.

3. The holding below, with respect to the important group of claims and grievances as to which it will stand as a precedent, departs sharply from basic federal labor policy expressed in national labor legislation and numerous decisions of this Court. In *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), this Court said that "as a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress" (379 U.S. at 652), noting in that connection that "if a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement" (379 U.S. at 653). So too, in *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1963), the Court held that doubts as to the scope of grievance procedures should be resolved in favor of applicability, stating that "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government" (363 U.S. at 581). See also *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960). And in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964), the Court, noting "the central role of arbitration in effectuating national labor policy" (376 U.S. at 549), applied the *Steelworkers* rule to a situation which "in all probability . . . was one not expressly contemplated . . . when the agreement was made" (376 U.S. at 554). See also

counsel, Railway Labor Executives Association, *Hearings on H.R. 706 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 89th Cong., 2d Sess., pp. 40-41 (1966); see also *Thirty-Third Annual Report of the National Mediation Board*, p. 45.

Teamsters Local v. *Lucas Flour Co.*, 369 U.S. 95, 106 (1962) (it is "the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare"); *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458-459 (1957) (the "congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes" is "clear").

Apart from an exception for wrongful discharge suits grounded upon state law,[8] the "federal labor policy" requiring utilization of contract grievance procedures culminating in grievance arbitration applies to railway labor cases. As stated above, Section 3 First (i) of the Railway Labor Act (45 U.S.C. § 153 First (i)) expressly provides that individuals' claims and grievances shall be handled in the manner prescribed by the parties' grievance procedure and are then subject to compulsory arbitration by an adjustment board. See *Trainmen* v. *Chicago R. & I. R. Co.*, *supra*, at 39; *Walker* v. *Southern R. Co.*, *supra*, at 198. Thus, Section 3 makes compliance with grievance procedures and grievance arbitration an express requirement of federal railway labor law in a fashion that is much more explicit than the corresponding requirement of Section 301 of the Labor Management Relations Act (29 U.S.C. § 185). And even in wrongful discharge cases grounded upon state law, to which Section 3 does not apply, see *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630 (1941); *Walker* v. *Southern R. Co.*, *supra*, the plaintiff "must show that he has exhausted his administrative remedies, under his contract of employment . . . , provided the applicable state law so requires." *Transcontinental Air* v. *Koppal*, 345 U.S. 653, 654 (1953); *Belanger* v. *New York Central Railroad Co.*, 384 F. 2d 35 (6th

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[8] See *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630 (1941); *Slocum* v. *Delaware, L. & W. R. Co.*, *supra*, at 244; *Transcontinental Air* v. *Koppal*, 345 U.S. 653 (1953); *Walker* v. *Southern R. Co.*, *supra*.

Cir. 1967); *Pacilio* v. *Pennsylvania Railroad Co.*, 381 F. 2d 570 (2d Cir. 1967).

4. We submit that the question presented was decided incorrectly below. Nothing in Section 9 of the Railway Labor Act justifies the lower courts' departure from the exhaustion requirement of *Maddox*, the exclusive jurisdiction rule of *Day*, *Slocum* and *Pitney*, or basic federal labor policy promoting use of grievance machinery culminating in arbitration. On the contrary, the claims involved in this case are subject to the parties' grievance procedure and to Section 3 of the Act, and therefore should not have been entertained by the District Court.

The parties' 1948 contract requires exhaustion of the grievance procedure with respect to "*all* claims and grievances arising on and after November 1, 1948" before redress is sought from "a tribunal"—whether it be the Adjustment Board or a court—"having jurisdiction pursuant to law or agreement" (J.A. 266). Therefore, even if Section 3 of the Act did not apply to the claims, so that the court that entered judgment on the Award could entertain them, "federal labor policy" nevertheless would require the claimants to exhaust the parties' grievance procedure before seeking redress in court. *Republic Steel Corp.* v. *Maddox*, *supra*.

We submit, however, that Section 3 *does* apply to these claims. Section 3 applies to disputes between individual employees and railroads "growing out of grievances *or* out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (45 U.S.C. § 153 First (i)) (emphasis added). The Orange Switcher claims undeniably grew out of the "application of agreements" within the terms of Section 3, because they grew out of violations of the National Diesel Agreement. See pp. 5-6, *supra*. The deadman control claims likewise grew out of the

"application of agreements" within the terms of Section 3, because they grew out of alleged violations of the "deadman control" rule established by the Award (J.A. 7), and the rules established by the Award are a part of the parties' "agreements affecting rates of pay, rules, or working conditions." See pp. 10-11, 13-14, *supra; Brotherhood of Railroad Trainmen* v. *Akron & B. B. R. Co., supra.* And even if that were not true, both groups of claims nevertheless would be within Section 3 because they constitute "grievances"—*i.e.*, they are "founded upon some incident of the employment relation, or asserted one," *Elgin, J. & E. R. Co.* v. *Burley, supra,* at 723. See *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railroad Tr.*, 342 F. 2d 298, 300 (5th Cir. 1965); *Ramsey* v. *Chesapeake & O. R. Co.*, 75 F. Supp. 740 (N.D. Ohio 1948).

Since the claims involved in this case are subject to Section 3, they are within the adjustment boards' exclusive jurisdiction and cannot be determined by the courts under the rule of *Day, Slocum* and *Pitney.* The District Court's entry of judgment upon the Award under Section 9 of the Act does not affect that conclusion. In relevant part, Section 9 provides only that awards shall be filed in court, that they "shall be conclusive on the parties as to the merits and facts of the controversy", and that if they are not set aside, "the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties" (45 U.S.C. §159 First, Second, Fifth, Sixth). Thus, on its face, Section 9 purports only to give the courts the power to confirm the "conclusive" character of an award. Since courts have the power to enforce their decrees, a court which enters such a judgment may order the parties to the award to comply with it if they refuse to do so. But Section 9 does not purport to vest in the court jurisdiction to entertain individuals' claims or grievances arising from misapplications of the award.

Nothing in either Section 3 or Section 9, or in the legislative history of these provisions, suggests that the Congress intended the scope of the "mandatory, exclusive, and comprehensive system for resolving grievance disputes" prescribed by Section 3 to be restricted by the entry-of-judgment provision contained in Section 9. Accordingly, the District Court's entry of judgment upon the Award under Section 9 did not justify its departure from the rule of *Day, Slocum* and *Pitney*.[9]

5. We note that the Court of Appeals stated that the District Court could make "available a judicial remedy" for the employees' claims and grievances as a condition of its injunction against strikes by respondent. However, we do not understand that to be an alternative ground for decision. Otherwise, the decision below would conflict directly with this Court's decision in *Central Kentucky Co. v. Comm'n*, 290 U.S. 264 (1933). There, this Court held that federal courts may not condition injunctive relief so as to make available a judicial remedy for matters within the exclusive jurisdiction of other tribunals.[10] See also

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[9] Analogously, under Sections 2 Seventh and 6 of the Act (45 U.S.C. §§ 152 Seventh, 156), courts may order the parties to a collective bargaining contract to comply with the contract if they refuse to do so. See *Southern Ry. Co. v. Brotherhood of Locomotive Firemen, Etc.*, 337 F. 2d 127 (D.C. Cir. 1964). But no one has ever contended that the entry of such a judgment would give the judgment court the power to entertain employees' claims for compensation arising from subsequent misapplications of the contract. That is precluded by Section 3, as construed in *Day, Slocum* and *Pitney*.

[10] In *Central Kentucky*, this Court confirmed the general "power of a court of equity, in the exercise of a sound discretion, to grant, upon equitable conditions, the extraordinary relief to which a plaintiff would otherwise be entitled, without condition" (290 U.S. at 271). The Court noted, however, that there "are nevertheless some limitations upon the extent to which a federal court of equity may properly go in prescribing such conditional relief, which are inherent in the nature of the jurisdiction which it exercises" (290 U.S. at 271), and held that it was improper to condition an injunction restraining enforcement of an invalid rate for the sale of natural gas upon consent to a rate deemed by the court to be appropriate,

Ventura Consolidated Oil Fields v. *Rogan*, 86 F. 2d 149, 154-155 (9th Cir. 1936). The *Central Kentucky* rule applies to conditions which would infringe the adjustment boards' jurisdiction under Section 3. See *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528, 532-534 (1960).[11] Therefore, the District Court could condition its injunction to make "available a judicial remedy" for the employees' claims *only if* the adjustment boards' jurisdiction is not exclusive—*i.e.*, only if (as the court below held) the District Court had jurisdiction to determine the claims as an incident of its power to enforce its judgment under Section 9. Whether the District Court had such jurisdiction is the question presented.

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because such interference with the legislative jurisdiction of a state administrative agency to fix just and reasonable rates "is not a proper exercise of the discretionary powers of a federal court of equity" (290 U.S. at 272).

[11] In the *M.-K.-T.* case, cited by the court below in support of its discussion of conditions, this Court held that a District Court, enjoining a strike over a minor dispute pending its disposition under Section 3, see *Trainmen* v. *Chicago R. & I. R. Co.*, *supra*, "is free to exercise the typical powers of a court of equity . . . to impose conditions requiring maintenance of the *status quo*" (363 U.S. at 531). In so holding, however, this Court cited *Central Kentucky* for the existence of such a power (363 U.S. at 532 n. 4) and emphasized that "federal courts ought not act in such a way as to infringe upon the jurisdiction" of adjustment boards under Section 3 (363 U.S. at 532-534). Thus, this Court's decision in *Missouri-Kansas-Texas* confirmed the applicability of the *Central Kentucky* rule to conditions that would infringe the adjustment boards' jurisdiction.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A: Railway Labor Act

SECTION 3. First. There is hereby established, a Board to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the

Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing

of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon the award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

* * * * *

SECTION 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided, further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. The determination of said circuit court of appeals upon said questions shall be final, and, being certified by

the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

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Appendix B: Judgment on Arbitration Award

[February 28, 1964]

The Award of National Railway Labor Arbitration Board No. 282 having been rendered pursuant to Section 3 of the Joint Resolution of the Congress of August 28, 1963, Public Law 88-108, 88th Cong., having been duly certified and acknowledged under the hands of the arbitrators and having been filed in this Court as provided for by Section 4 of the said Joint Resolution and Section 8 of the Railway Labor Act; and

Petitions to impeach said award having been filed and heard by this Court in Civil Actions No. 2919-63 and No. 2921-63; and

This Court having rendered its decision on January 8, 1964, and having entered judgment on January 10, 1964, dismissing the said actions; and

The United States Court of Appeals for the District of Columbia Circuit having on February 20, 1964, affirmed the aforesaid judgments of this Court:

IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby entered on the arbitration award heretofore filed herein, which judgment is final and conclusive upon the parties.

ALEXANDER HOLTZOFF,
United States District Judge.

February 28, 1964.

Appendix C: Order of District Court

[May 11, 1964]

This matter came on to be heard upon the prayer of the carrier parties herein for injunctive relief in their Motion for Supplementary Relief Based upon Judgment on Arbitration Award, supported by affidavits and attached documents, upon the Response to Order to Show Cause and Countermotion for Injunctive Relief filed by the Brotherhood of Locomotive Firemen and Enginemen et al., supported by affidavit and attached documents, and upon additional affidavits and attached documents submitted by the carrier parties.

The Court upon due consideration of the aforesaid papers, the memoranda of points and authorities submitted by the parties and oral argument on their behalf, having determined that the Brotherhood of Locomotive Firemen and Enginemen through its officers, agents, employees, members and persons acting in concert with them is threatening to engage in strikes or work stoppages against the carriers, or to picket the premises of such carriers, over a dispute or disputes as to the meaning or application of the Arbitration Award upon which judgment heretofore has been entered in this proceeding, unless enjoined by this Court; that such strikes, work stoppages or picketing are illegal under Public Law 88-108 and the judgment heretofore entered in this proceeding upon the Award by Arbitration Board No. 282; that such strikes, work stoppages or picketing will cause irreparable injury to the carriers; that injunctive relief against such strikes, work stoppages and picketing is necessary to prevent such irreparable injury and to protect and preserve the jurisdiction of Arbitration Board No. 282 over the disputes concerning the meaning and interpretation of its Award and of the Court over the rulings made by the Board with respect to such disputes; and, assuming that the Court has jurisdiction to condition such injunctive relief upon the carriers refraining from the implementation of disputed applications of the Award pending determination of those disputes by the Board or to enjoin the carriers from so acting, that the

circumstances do not justify the imposition of such a condition or the granting of such an injunction;

IT IS HEREBY ORDERED:

1. That the Brotherhood of Locomotive Firemen and Enginemen, its officers, agents, employees, members and all persons acting in concert with them, be and they hereby are permanently enjoined from authorizing, calling, encouraging, permitting, or engaging in any strikes or work stoppages, and from picketing the premises of the carriers, over any dispute as to the meaning or application of the Arbitration Award on which judgment heretofore has been entered in this proceeding;

2. That the Countermotion for Injunctive Relief is in all respects denied; and

3. That this Court reserves jurisdiction for the purpose of enabling any of the parties to this proceeding, or any person that may be or may hereafter become bound in whole or in part by this order, to apply to this Court at any time for such further orders as may be necessary or appropriate for the construction, carrying out or enforcement of this order or of the judgment heretofore entered in this proceeding upon the Award by Arbitration Board No. 282, or any legal obligation resulting therefrom.

ALEXANDER HOLTZOFF,
United States District Judge.

Dated: May 11, 1964.

Appendix D: Opinion of District Court *

[March 28, 1966]

The Court: This is a motion by the Brotherhood of Locomotive Firemen and Enginemen for an order declaring that the Southern Pacific Company and all other carriers represented by certain Conference Committees are obligated, pursuant to the judgment heretofore entered in this proceeding upon the Award rendered by Arbitration Board No. 282, to pay the claims of their respective locomotive firemen employees for loss of wages and loss of other forms of remuneration caused to them by alleged violations by the carriers of the Arbitration Award, and that the validity of those claims is not dependent upon their being filed and processed in the manner prescribed by Section 17 of a collective bargaining agreement entered into on August 11, 1948.

Specifically, the claims that are enumerated in the papers attached to the motion are claims of firemen who alleged that they would have been employed on certain days if the carriers had not operated certain engines without a fireman in violation of the terms of Award 282.

The claims are for the wages that the firemen in question would have earned had they been employed on those days, as they claim they should have been.

The carriers contend that the claims should be submitted and handled pursuant to certain provisions contained in a collective bargaining agreement dated November 1, 1948. These provisions are contained in Section 17 of that agreement and provide for an administrative remedy consisting of several steps within the organization of the carrier. The claims must be submitted within sixty days after the date on which it arose.

If eventually the claim is denied, recourse would be had to the National Railroad Adjustment Board.

It is claimed by the moving parties that there is no obligation to submit the claims for a determination by the administrative process in the first instance.

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* Reported at 253 F. Supp. 532.

Section 17 starts out by providing that, "All claims or grievances arising on and after November 1, 1948 shall be handled as follows." There follows a detailed outline of the procedure.

To be sure, if this language is construed literally, the claims here presented would be subject to the provisions of Section 17 and the remedy provided by Section 17 would be exclusive.

However, it was subsequent to the date of the 1948 agreement that the compulsory arbitration resulting in Award 282 was undertaken.

After that arbitration was concluded an action to impeach the Award was brought by some of the parties. That action resulted in a determination that the Award was valid.

Section 9 of the Railway Labor Act, 45 U. S. Code, 159, paragraph Second, provides that in such an event the "court shall enter judgment on the award, which judgment shall be final and conclusive on the parties."

Consequently, there is presented here a judgment of this Court confirming the Award. This Court, like all courts, has the authority, in fact the duty, of enforcing its own judgments.

Only recently the Supreme Court held that an award of the National Adjustment Board is not only final and binding but may be enforced judicially, Gunther v. San Diego and Arizona Eastern Railway Company, 382 U. S. 257.

So, too, the Supreme Court has held that the mere fact that there is an administrative remedy in existence in respect to a grievance of an employee of a railroad company does not bar his resort to the courts, Moore v. Illinois Central Railroad Company, 312 U. S. 630.

The question before the Court is not whether the claimants have a right to resort to the grievance procedure. The question is whether they are obligated to do so.

The Court is of the opinion that the prior agreement may not oust the court of jurisdiction to determine a claim arising subsequently.

It is quite clear that the parties could not have had in contemplation the possibility of a compulsory arbitra-

tion sometime in the future terminating in a judgment of the court and could not have intended to provide that if there should be any claims arising under an unanticipated award or the judgment, the grievance procedure should be exclusively applicable.

The Court is of the opinion, therefore, that a claimant—and when I say a claimant, I mean the claimants involved in this motion—may resort either to the grievance procedure prescribed by Section 17 or may apply to the Court to enforce the judgment of this Court.

This is not to say that the Court will pass on every alleged claim for money individually which may be asserted under the Award. The Court may always invoke the doctrine of forum non conveniens.

But insofar as the claims here involved are concerned the Court is of the opinion that they may be judicially entertained without resort to the procedure under Section 17 of the 1948 agreement.

A somewhat similar conclusion was recently reached by Judge Simpson of the United States District Court for the Middle District of Florida, in an unreported opinion, in Order of Railroad Conductors and Brakemen and Brotherhood of Locomotive Firemen and Enginemen v. Florida East Coast Railway Company, rendered on February 28, 1966.

In that case the court made the following statement in regard to provisions providing for an internal grievance procedure: "Those provisions of the contract imposing time limitations upon the processing of individual grievances, specifically those contained in Article 19 of said agreement, have no application to and impose no limitation on this Court's power to enforce its injunction entered January 6, 1965 in this cause."

I concur with the principle on which that statement is based and reach the conclusion that the limitations prescribing the use of grievance procedure within a certain specified period have no application and impose no limitation on the power of this Court to enforce its judgment confirming the Award of Board 282.

Counsel may submit a proposed judgment in accordance with this ruling.

The Court might add that the case of Republic Steel Corporation v. Maddox, 379 U. S. 650, is clearly distinguishable because that case involved a claim for money due under a collective bargaining agreement, whereas in this case we are confronted with a claim under an award of a compulsory arbitration board established by Congress, the award having been later confirmed by the Court.

Appendix E: Order of District Court

[April 6, 1966]

This matter came on to be heard on February 16, 1966, and March 28, 1966, and the Brotherhood of Locomotive Firemen and Enginemen having filed a Memorandum of Points and Authorities and affidavits in support of its Motion, and the Southern Pacific Company and other carriers having filed a Memorandum of Points and Authorities and an affidavit in opposition to said Motion and a Supplemental Memorandum of Points and Authorities, and the Court being fully advised and having delivered its Opinion on said Motion on March 28, 1966, it is hereby

DECLARED AND DECREED, that claims or grievances of the Brotherhood of Locomotive Firemen and Enginemen and the firemen (helpers) it represents, referred to in the motion, based on alleged violations or misapplications of Award of Arbitration Board No. 282, on which Award judgment was entered by this Court on February 28, 1964, are not subject to the compulsory grievance procedure established by section 17 of a certain collective agreement entered into on August 11, 1948 by the Brotherhood of Locomotive Firemen and Enginemen and other labor unions on the one hand and on the other hand by the Southern Pacific Company and numerous other carriers; and such claims or grievances, if otherwise valid, may be enforced without the Brotherhood or the employees it represents first resorting to the procedure established by section 17 of the said 1948 agreement.

/s/ ALEXANDER HOLTZOFF,
United States District Judge.

April 6, 1966

Appendix F: Opinion of District Court *

[June 2, 1966]

The Court: By its decision of March 28th, 1966 this Court ruled on a motion made by the Brotherhood of Locomotive Firemen and Enginemen that locomotive firemen who had claims for loss of wages or other forms of remuneration caused by failure to employ them on certain days because of violations of Arbitration Award 282 had a choice of remedies, either an administrative remedy prescribed by the collective bargaining agreement or by a judicial proceeding in this court or in other courts that have jurisdiction.

The carriers involved in that motion have now moved to amend the order so that it would provide, in effect, that if a claimant instituted an administrative remedy and abandoned it before the remedy was concluded, he may not then resort to a judicial remedy.

Obviously if a claimant had pursued the administrative remedy to the end, including an appeal to the special adjustment board and had not prevailed, he would be barred from pursuing a judicial remedy. The question here presented is a narrow one. Suppose he abandons his administrative remedy in the course of pursuing it and before he reaches the consummation of that remedy, may he then resort to a judicial remedy.

It must be borne in mind that some of these claims arise out of what might be called a safety provision in Award 282. The basic background of those aspects of the Award which relate to dispensing with the use of firemen on most freight engines is that while two men are necessary in a locomotive cab, actually there were three men on freight engines, the third man being the head brakeman, and that one of them could be dispensed with and that was the fireman. There was a provision that in yard service engines could be operated without a fireman, provided they were equipped with a deadman's button.

Several of the claims involved in this motion arise out of the fact that on several occasions road engines were

* Reported at 255 F. Supp. 290.

used in yard service without a fireman and, naturally, road engines were not equipped with deadman's buttons. Consequently, the claims of firemen who would have been employed on those occasions for the wages that they would have earned, although are somewhat synthetic and artificial, they are a means of enforcing or imposing a sanction on failure to comply with this provision which has an aspect of safety.

Other claims arise from failure to use firemen under other circumstances where, perhaps, safety was not involved.

Counsel for the plaintiffs makes a very cogent argument, basing it on a line of cases arising out of collective bargaining agreements which provide for an administrative remedy. The cases in question hold that even if there is a remedy by way of a judicial proceeding, once the claimant, that is, the employee, resorts to his administrative remedy he is bound to exhaust it.

The situation here is different. These claims do not arise under a collective bargaining agreement. To be sure, this Court has held that the Arbitration Award—and it must be borne in mind that it was a compulsory arbitration prescribed by the Congress—had some of the same effects that a collective bargaining agreement would have and that it created a new status by way of conditions of employment and so on, a status that cannot be changed except by recourse to the Railway Labor Act. But the Award had certain additional weight beyond that which would make it equal to a collective bargaining agreement. It was an award of a compulsory arbitration board which was, in an action to impeach it, confirmed by this Court in a proceeding resulting in a judgment of this Court. It was because of this difference, in part, at least, that the Court held that the administrative remedy was not exclusive because the administrative remedy applied to claims under collective bargaining agreements.

We then must resort to basic principles. There is indeed a doctrine known as election of remedies and there are cases that hold, in effect, that if there are two remedies, if the claimant elects one he may not thereafter abandon it and pursue another. But this is too broad a statement.

The better doctrine is that election of remedies is binding only if the second remedy that is sought to be invoked is based on a theory which is irreconcilable with that upon which the first proceeding was founded. We have, of course, the familiar example of a person suing for recission of a contract on the ground that it was obtained by fraud, who may not thereafter ratify the contract and sue for damages, the theory being that the second remedy is irreconcilable and inconsistent with the first.

But if the two remedies are not inconsistent and are not irreconcilable, the doctrine of election of remedies does not apply. This was held in a case decided many years ago by the Court of Appeals for the Second Circuit, Equitable Trust Co. of New York v. Connecticut Brass & Mfg. Corp., 10 F. 2d 913. It should be noted that Judge Learned Hand was a member of the panel that sat in that case and concurred in the decision.

So it seems to the Court that as a matter of pure theory of law there is no inconsistency here and that therefore there should be no bar to pursuing the judicial remedy after abandoning the administrative remedy subsequent to its institution.

The situation would be different if the administrative remedy had been pursued to the end and a definitive rejection of the claim had been reached.

But there are practical considerations here. There was a period of uncertainty in which a claimant could not be sure whether he had a judicial remedy or an administrative remedy or both, and it was not unnatural for him to protect himself by filing a claim in view of the fact that there was a sixty-day limitation upon the filing of the claim. So, too, it must be borne in mind that these claims were not filed through lawyers; they were filed by employees, who are not legally trained, in their own behalf.

It might be argued, of course, that there must be some time limitation. That was argued before this Court on a previous occasion. It seems to this Court that the Supreme Court has answered that in a recent decision in which it held that the local statutes of limitations would apply to claims of employees.

In view of these considerations the Court reaches the conclusion that a claimant presenting a claim of the type involved in this motion for administrative consideration and who abandons his administrative remedy before it reaches a conclusion is not barred from pursuing such judicial remedies as he may otherwise have.

The motion is denied.

Appendix G: Opinion of Court of Appeals

[October 6, 1967]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Before WRIGHT, TAMM and LEVENTHAL, *Circuit Judges.*

PER CURIAM: In prior proceedings the District Court enjoined the Brotherhood of Locomotive Firemen and Enginemen from striking over any dispute about the meaning or application of the award of Arbitration Board No. 282.[1] *In re Certain Carriers, etc.*, D.D.C., 229 F.Supp. 259 (1964). In its order the court reserved jurisdiction for any of the parties "to apply to this Court at any time for such further orders as may be necessary or appropriate for the construction, carrying out or enforcement of this order or of the judgment heretofore entered in this proceeding upon the Award by Arbitration Board No. 282, or any legal obligation resulting therefrom."

The court, in explaining its order, stated: "If the railroads take any step in carrying out the award which later turns out to be erroneous, any employee who has been damaged in the meantime must receive full restitution. There is no question that this would be the legal obligation of the railroads if such a situation arises." 229 F.Supp. at 260. The court further stated that if the railroads refused to comply with their obligations under the award the court "would compel them to comply." *Id.* at 261.

In the present proceeding before the District Court, the union sought redress on behalf of certain employees of the railroad for injuries resulting from alleged violations and misapplications of the award of Arbitration Board No. 282.

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[1] Arbitration Board No. 282 was convened pursuant to Public Law 88-108, 77 Stat. 132 (1963), 45 U.S.C. § 157 (1964), which provided for compulsory arbitration of a then pending labor dispute between the railroads and the unions. For the complete background of this litigation *see Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R. Co.*, D.D.C., 225 F. Supp. 11, *affirmed*, 118 U.S. App. D.C. 100, 331 F. 2d 1020, *cert. denied*, 377 U.S. 918 (1964).

The railroads challenged the jurisdiction of the court to grant relief on the ground that these claims of alleged violations of the award must be processed pursuant to the procedures of Section 3 of the Railway Labor Act. 45 U.S.C. § 153 (1964).

We agree with the District Court. That court sustained the award of Arbitration Board No. 282.[2] The award provides benefits and obligations on both sides in this labor dispute. On the petition of the railroads the court has enforced the award against the union. *In re Certain Carriers, etc., supra.* It likewise has jurisdiction to enforce the award against the railroads. The railroads, like the unions, are subject to the court's power to enforce its own decrees.

The general power of an equity court to impose conditions on those who seek equitable relief exists where an injunction is sought to enforce the provisions of the Railway Labor Act. *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U.S. 528 (1960). There the carriers sought an injunction to prevent a strike over a "minor" dispute concerning their power, despite the collective agreement, to change "run" lengths and thereby eliminate jobs. Although there is no right to strike over a minor dispute, the Court sanctioned the issuance of an injunction conditioned on the carriers' refraining from imposing their view of the contract until the Adjustment Board finally determined the matter.

If the District Court's decree had used the approach sanctioned in *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co., supra,* and had conditioned the injunction on the carriers' refraining from acting under their view of Award 282 until disposition of the numerous specific disputes by either the Adjustment Board or Arbitration Board 282, this would have been a *de facto* suspension of Award 282 at variance with the spirit of the Act, which contemplated an immediate application of that award. Even assuming, but by no means deciding, that the carriers are right that these claims are minor disputes for which the contract provided a usual procedure within Section 3 of the

[2] *See Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R. Co., supra* Note 1.

Railway Labor Act,[3] the District Court did not abuse its discretion in establishing a condition that employees injured by misapplication of the award have available a judicial remedy, and do not have to wait years for Adjustment Board vindication.[4]

Affirmed

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[3] The fact that a dispute is not a major dispute governed by § 6 of the Railway Labor Act, 45 U.S.C. § 156 (1964), does not necessarily mean that it is a minor dispute governed by § 3. *See* McGuinn, *Injunctive Powers of the Federal Courts in Cases Involving Disputes Under the Railway Labor Act*, 50 Geo. L. J. 46, 65-72 (1961); *compare Brotherhood of Railroad Trainmen* v. *New York Central R. Co.*, 6 Cir., 246 F. 2d 114, 117-119, *cert. denied*, 355 U.S. 877 (1957); *cf. Order of Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 341 (1960).

[4] The carriers did not appeal from the reservation of jurisdiction at the time the decree was entered. Assuming they did not lose their right to protest the condition—perhaps because protest at the time of the decree would have been premature in view of the generality of the reservation as entered—we now determine that the condition as implemented was not an abuse of discretion.

Appendix H: Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Before: WRIGHT, TAMM and LEVENTHAL, *Circuit Judges.*

JUDGMENT

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the District Court appealed from in this case are hereby affirmed.

It is further ORDERED by the court that appellee herein recover from appellants its taxable costs on this appeal, and have execution therefor.

Per Curiam.

Dated: October 6, 1967

Appendix I: Order and Memorandum of Court of Appeals

[December 15, 1967]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Before: WRIGHT, TAMM, and LEVENTHAL, *Circuit Judges*, in Chambers.

ORDER

On consideration of appellants' petition for rehearing, appellee's answer, and appellants' reply, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam.

MEMORANDUM

A petition for rehearing filed by appellant carriers contends that our opinion of October 6, 1967, is inconsistent in certain respects with our opinions of May 12, 1967, and July 31, 1967, in *BLFE* v. *Bangor and Aroostook R. Co.*, Nos. 20192, 20193, 20215 and 20216, — F. 2d —.

We provide this further analysis with full awareness that the terrain we traverse is so bumpy that we may be raising more dust than we settle, especially since issues can apparently be spun out *ad infinitum*.

The *Bangor and Aroostook* litigation was concerned with the period following the expiration of Award 282. This Court held that work rules established by Award 282 survived the expiration of that Award—a result sought by the carriers—on the theory that the substantive work rules established during the award's life (but not the procedures set up to modify work rules during the life of the Board) were "deemed to be incorporated into the prior agreements of the parties that themselves endure by virtue of the Railway Labor Act unless and until changed in accordance with that statute." — F. 2d at —, (Supplemental Opinion July 31, 1967, Slip Opinion at 8)

It does not necessary follow, as the carriers suppose, that each and every contract provision established in former years by the parties to implement work rules settled purely

by agreement were applicable with full vigor to implement the work rules provided by agreement as constructively enlarged to embrace work rules effectuated by Board 282.

We need not pursue that line of thought, for in the case of appellant Southern Pacific the lawsuit was not focused on the legal constructs applicable to the period following the expiration of the award. The underlying action was brought by the carriers during the lifetime of the award, to adhere to the award. The carriers cannot fairly contest the Court's authority to establish the condition under discussion; on their claim to require the union to refrain from action violating a duty resulting from the award they could not fairly contest jurisdiction to issue an injunction on a cross-claim to require carriers to abide by their duties under the Award.

Furthermore, there is sound equitable basis for omitting the claims-and-grievance procedure established in 1948 and 1949 agreements, even assuming its applicability. Concepts of exhaustion of remedies will not be pursued with remorseless logic, at least in situations not fairly contemplated when the remedies were established, when the consequence would contravene basic expectations of justice by mandating a futile or unduly protracted procedure. *United Protective Workers* v. *Ford Motor Co.*, 194 F.2d 997, 1000 2 (7th Cir. 1952); *United Protective Workers, Local No. 2* v. *Ford Motor Co.*, 223 F.2d 49, 51 (7th Cir. 1955).

In this case the carriers are in effect urging that issues fully considered at pertinent top levels of management and labor are subject to an objection for failure to pursue remedies provided at lower levels even though the obvious purpose of those remedies was to winnow out the issues that need not come to the top.* Exhaustion under such circumstances would be a long circuit bypassing the practical and the just.

Petition for rehearing denied.

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* Cf. Pharmaceutical Mfrs. Ass'n v. Gardner, — U.S. App. D.C. —, 381 F. 2d 271 (1967) (McGowan, J.).

SUPREME COURT U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1230

SOUTHERN PACIFIC COMPANY, *Petitioner*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1963 Congress enacted Public Law 88-108, 77 Stat. 132, subjecting the railroads and the operating unions to a "one-shot solution" of a then pending dispute over "firemen on diesels" and "crew consist" by imposing compulsory arbitration of the dispute. On November 26, 1963, the arbitration board issued the award for which it was established, binding for two years from its effective date. In May 1964 the railroads instituted proceedings in the District Court to enjoin a strike by

Respondent over a dispute concerning the meaning and application of this "one shot" arbitration award. The Court issued such injunction, reserving jurisdiction for the purpose of enabling any party to apply to the Court for further orders appropriate to the enforcement of said injunctive order or the judgment theretofore entered on the award "or any legal obligations arising therefrom". (J.A. 19) Petitioner expressly did not object to such reservation of jurisdiction. On April 6, 1966, upon application of Respondent, the District Court entered an order declaring that Petitioner was subject to judicial enforcement of its obligations under the Award without Respondent first exhausting contract procedures for rectification of violations of collective bargaining agreements. (J.A. 329)

Was it an abuse of discretion, or did the District Court act beyond its jurisdiction, in making such reservation, in issuing such injunction, and thereafter issuing such declaration?

STATEMENT OF THE CASE

We believe that for an informed ruling on the petition for a writ of certiorari this Court should have an understanding of the essential facts that gave rise to the issue that was really decided by the courts below and is presented by the record before this Court. The Court cannot acquire an understanding of those facts from the statement in the petition for a writ of certiorari.

Approximately 160 railroads were parties to the arbitration award proceedings with respect to Respondent. One of the two major subjects with which the Award was concerned was the establishment of a procedure for the gradual reduction of locomotive firemen (engi-

neer helpers) from their jobs on the 160 railroads, under circumstances that would tend to minimize the hardship on the employees and their families, and would not unduly burden the public relief rolls.

There were approximately 30,000 locomotive firemen employed on freight locomotives and on yard switching locomotives at the time that the Arbitration Award was issued on November 26, 1963.[1]

The plan by which the locomotive firemen were to be eventually severed from their employment as painlessly as possible was, of course, the "brain child" of the three public members on the Arbitration Board. The plan adopted has no known precedent in American industry.

At the time that the Award was issued, the neutral members of the Board, and officials in the Department of Labor, anticipated that the application of the Award during the two years it would be in effect would cause a reduction in the number of locomotive firemen to the extent of about 5500 employees.[2] But the neutral mem-

---

[1] *Bro. of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R.R. Co.*, 225 F. Supp. 11, at 14.

[2] "In the course of Congressional testimony, Chairman Ralph Seward of Board 282 and Assistant Secretary of Labor James Reynolds indicated that their original expectation was that the procedures would lead to a reduction of about 5500 jobs, rather than the 18000 the carriers succeeded in blanking. See Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce, 89th Cong., 1st Sess., ser. 89-45 at 363-64, 465-66 (1965). And according to Senator McGee, the number of firemen eliminated also exceeded the expectations of "Members of the U.S. Senate." Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce, 89th Cong. 2d Sess., ser. 89-56, at 1030 (1966)." *Brotherhood of Railroad Trainmen et al.* v. *Akron & Barberton Belt R.R., et al.*, 385 F. 2d 581 (D.C. Cir. 1967).

bers of the Arbitration Board sadly underestimated the "resourcefulness" of the carriers' experts on labor relations who comprise the Eastern, Western, and Southeastern Carriers' Conference Committees. The carriers actually succeeded in separating 18,000 locomotive firemen from their employment and seniority rights, and the vast majority of those had been eliminated early in the first year of the Award, as the record illustrates (J.A. 28).

The Award, while it was issued on November 26, 1963, was not made the subject of a judgment until February 28, 1964 (J.A. 13). The proceeding in which the judgment was entered in the District Court was designated Miscellaneous No. 41-63. And approximately three more months elapsed before the Award became effective with respect to the firemen's crafts, which occurred on May 7, 1964.

As the effective date of the Award neared, the carriers quickly demonstrated that they had their own notions as to how the unique provisions of the Award were to be interpreted and enforced. The Brotherhood's views differed widely from many of those demonstrated by the carriers, and the only immediate means by which the Brotherhood could prevent the carriers from pushing ahead heedless of the employees' interests was to threaten strike action.

The carriers thereupon promptly filed a motion for supplementary relief in Miscellaneous No. 41-63, in which they prayed for an injunction that would restrain the Brotherhood and every locomotive fireman employed on the 160 railroads from resorting to any form of strike action that would interfere with the carriers' interpreting and enforcing the Award according

to the carriers' own notions. The injunction as prayed for was granted, and was entered of record on May 11, 1964. The Brotherhood countered in the same Miscellaneous No. 41-63 with a motion in which it sought an injunction against the carriers which would require the management of each railroad to faithfully interpret and apply the provisions of the Award. The Court denied the Brotherhood's motion. The denial constitutes paragraph 2 of the May 11, 1964, District Court's order (p. 8a, Appendix to petition for writ of certiorari; J.A. 19).

The Brotherhood and the crafts of firemen employed on the 160 railroads of the country were thus stripped by the May 11, 1964, order of the right to employ self help in any form to protect their employment rights under the Arbitration Award, and there was no court or other tribunal in the country to which they could appeal for protection of their rights, according to the Brotherhood's concept of the law, except to appeal to the District Court below under its reservation of jurisdiction in Miscellaneous No. 41-63 in granting the aforesaid injunction against Respondent. That reservation of jurisdiction reads as follows:

> "That this Court reserves jurisdiction for the purpose of enabling any of the parties to the proceeding, . . . to apply to this Court at any time for such further orders as may be necessary or appropriate for the construction, carrying out or enforcement of this order or of any judgment heretofore entered in this proceeding upon the Award of Arbitration Board No. 282 or any legal obligations resulting therefrom."

The Award, being a unique document, was also a highly controversial document. The members of Arbi-

tration Board 282, during the two-year life of the Award, reconvened fourteen times to interpret the Award, and during that period it resolved 200 classes of disputes pertaining to the employment of locomotive firemen.

Although the Award went into effect on May 7, 1964, it was nine months later, on February 11, 1965, before enough interpretations had been rendered by Arbitration Board No. 282 to enable the Brotherhood to avail itself of the remedy provided by the reservation of jurisdiction in the May 11, 1964 District Court's order. The Brotherhood filed a motion for supplemental relief, supported by an affidavit executed by the Brotherhood's general chairman representing the locomotive firemen employed on six seniority districts that comprise a minor part of the Southern Pacific Railroad's lines, those that lie within the states of Louisiana and Texas. That affidavit is reproduced at pages 27 to 173 of the Joint Appendix. It lists 940 instances of money claims and loss of jobs that developed on the Texas and Louisiana lines between May 7, 1964, and January 27, 1965, as a result of what the Brotherhood believed were violations and misapplications of the Arbitration Award in nine different categories. The experiences of the locomotive firemen on the Texas and Louisiana lines of the Southern Pacific were not abnormal.

The Southern Pacific Company responded to the Brotherhood's motion for supplemental relief, not only by challenging the merits of the claims, as it had when the Brotherhood took them up with the top officials of the Southern Pacific, but also by asserting that the claims were barred because the individual claims had not been processed through the grievance procedure that had been established by Section 17 of a national

collective agreement that the Brotherhood had entered into with the carriers in August of 1948 (J.A. 174-176). Prior to appearing in court, the carrier had not taken such position. The carriers thereafter informed the Brotherhood that they considered all employees' claims and grievances growing out of the application of Award 282 to be subject to the requirements of the Section 17 grievance procedure, and that they would be considered barred if they were not processed in accordance with that procedure. (Gilmore affidavit, J.A. 249-251).

The procedural steps involved in the Section 17 grievance procedure has been accurately detailed in the affidavit filed by the carriers. (J.A. 175-176). We quote that explanation:

> "(i) Ordinarily, claims are made initially on an employee's 'Time Return and Delay Report,' submitted to the carrier's timekeepers. (An example of a Time Return and Delay Report is attached hereto as Exhibit C-1.) In any event, a claim or grievance must be presented in writing within sixty days from the date of the occurrence on which it is based; otherwise it is barred.
>
> "(ii) Claims that are not allowed ordinarily are disallowed with a 'Time Correction Notice,' issued by the timekeeper over the Superintendent's signature. (An example of a Time Correction Notice is attached hereto as Exhibit C-2.) In any event, the carrier has sixty days from the date on which a claim is made to disallow it and send notice thereof to the employee or his representative; otherwise, the claim is considered valid and must be settled accordingly.
>
> "(iii) The claim then may be appealed by the employee's Local Chairman to the Superintendent of the employee's seniority district, within sixty days from receipt of the notice of disallowance;

otherwise, the matter is considered closed. (An example of such an appeal is attached hereto as Exhibit C-3.)

"(iv) The appeal then may be disallowed and notice of disallowance given to the Local Chairman within sixty days from the date of the appeal; otherwise, the claim is considered valid and must be settled accordingly. (An example of such a notice is attached hereto as Exhibit C-4.)

"(v) The Superintendent then must be notified by the Local Chairman that his decision is rejected, and the claim must be appealed by the General Chairman to the carrier's Manager of Personnel, all within sixty days from receipt of the Superintendent's decision; [4] otherwise, the matter is considered closed. (An example of a notice that the Superintendent's decision is rejected is attached hereto as Exhibit C-5; an example of an appeal to the Manager of Personnel is attached hereto as Exhibit C-6.)

"(vi) The Manager of Personnel then must notify the General Chairman of his decision within sixty days from the date of appeal; otherwise, the claim is considered valid and must be settled accordingly. (An example of such a decision is attached hereto as Exhibit C-7.)

"(vii) The General Chairman then must notify the Manager of Personnel that his decision is not accepted within sixty days after written notice of the decision; otherwise, the decision is final and binding. (An example of such notice is attached as Exhibit C-8.)

"(viii) The General Chairman then must list or 'docket' the claim for conference with the Manager of Personnel. Most claims and grievances not disposed of at an earlier stage in the procedure are settled in such conferences. Following the confer-

ence, the Manager of Personnel notifies the General Chairman in writing of his final decision.

"(ix) Thereafter, proceedings may be instituted 'before a tribunal having jurisdiction pursuant to law or agreement of the claim or grievance involved.' Such proceedings must be commenced within six months from the date of the decision of the Manager of Personnel, following the conference, or such extensions of that period as are agreed to by the parties. Otherwise, the claim is barred. Cases which otherwise would be submitted to the National Railroad Adjustment Board (45 U.S.C. § 153) may be and always are submitted, with consent to the parties, to a special board of adjustment established by contract between the BLF&E and the carrier."

The innumerable disputes that developed over the enforcement of Award 282 originated at the top level of railroad management and Brotherhood officials, not at the operating level beginning with a complaint by an individual fireman or his local chairman to one of the carrier's lower echelon of operating officials. From the offices of the Eastern, Western, and Southeastern Carriers' Conference Committees in Chicago, Illinois, instructions were issued to the carriers' top personnel officers regarding the manner in which Award 282 should be interpreted and applied. On the part of the Brotherhood, its top representative on each railroad is a general chairman of the general grievance committee. As a carrier put into effect novel and dubious methods of interpreting and applying the Award, the general chairman would challenge the propriety of the action by a direct communication to the carriers' top official in charge of personnel. Conferences would follow, and the carriers' final response would uniformly

be that the carrier was properly interpreting and applying the Award, and no change would be made. (As an illustration, see J.A. 104 and 190, J.A. 254, paragraph 3 of Lohrke affidavit at J.A. 253.)

By the latter part of 1965 the Brotherhood was stymied in its efforts to protect the working rights of the firemen it represented because of the carriers' insistence that compliance with the Section 17 grievance procedure was compulsory before the carriers had any obligation to satisfy the firemen's claims and grievances, The Brotherhood sought to meet that issue squarely and with finality, by filing on December 1, 1965, in Miscellaneous No. 41-63 a motion for supplemental relief. The motion was directed at the Southern Pacific Company and at all other carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees. To thwart a claim by the carriers that the proceeding posed a purely hypothetical issue, the motion was supported by affidavits which set forth the circumstances that compelled the Brotherhood to seek a ruling on the Section 17 grievance procedure defense. The affidavits also presented certain specific instances of the typical manner in which the Section 17 issue developed with the carriers.

The District Court ruled that compliance with the Section 17 grievance procedure was not compulsory with respect to these violations of the arbitration award, and hence, that procedure need not be exhausted before the Brotherhood could approach the Court seeking supplementary relief in the form of an order requiring a carrier to cease violating Award 282 and to correct the wrongs it had already inflicted upon its employees by its wrongful application of the Award.

An appeal was taken from the District Court's ruling. That appeal was taken on behalf of "Southern Pacific Company and Certain Carriers Represented by The Eastern, Western, and Southeastern Carriers' Conference Committees, Appellants."

The Court of Appeals affirmed the ruling made by the District Court.

This Court will note that the petition to this Court for a writ of certiorari *is filed on behalf of one carrier only, to wit, Southern Pacific Company.*

COMMENTS ON "QUESTION PRESENTED"

At page 2 of the petition the petitioner states its version of the "Question Presented". We suggest, with respect, that the question stated by the petitioner was not presented to nor ruled upon by the Court below. Hence, it is not a proper question to present to this Court, on the basis of the record before this Court.

The issue that developed and was decided by the courts below was the product of the unique proceeding that the carriers initiated in Miscellaneous No. 41-63.

As previously stated, a judgment was entered of record upon Arbitration Award No. 282 by the District Court on February 28, 1964, as provided in Public Law 88-108. When the time arrived, on May 7, 1964, for the Award to be put into effect, the carriers and the Brotherhood were in wide disagreement as to how numerous provisions in the Award should be interpreted and applied.

The carriers' views were no more entitled at that time to be considered the correct views than were the Brotherhood's views. The proper procedure available

to the carriers under the circumstances was indicated by Public Law 88-108, in the following language:

> "Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, and the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act."

Section 7(m) of the Railway Labor Act prescribes the procedure to be pursued by a party to an arbitration award when a dispute develops regarding its meaning or application. Section 7 states that the agreement establishing an arbitration board "shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; . . . ."

The carriers disregarded this requirement of the Act. And without any authority whatsoever to be found in Sections 7 and 8 of the Act for their action, the carriers instituted a supplemental proceeding in Miscellaneous No. 41-63 to obtain an injunction that would tie the hands of the Brotherhood and the locomotive firemen it represented, by restraining them from interfering in any manner with the carriers proceeding to put the Award into effect in accordance with their own views.

The Brotherhood sought to even the responsibility for enforcing the Award conscientiously and in keeping with the Arbitration Board's interpretations of the Award by moving the District Court to issue an injunction directed at the carriers. This request by the Brotherhood was supported by Section 7(n) of the Act,

which provides that an agreement to arbitrate "shall provide that *the respective parties to the award will each faithfully execute the same.*"

The District Court denied the Brotherhood's motion. The carriers were thus left scot-free to interpret and apply the Award without being subject to any restraint other than the admonition of the statute, while the Brotherhood and the employees it represented were without any immediate means of protection from losses of wages and of jobs resulting from the immediate and improper application of the Award.

However, the Court saw fit to condition the injunction it had granted the carriers by declaring that it would keep the door to the Court open so that the Brotherhood could return to the Court for orders that "may be necessary or appropriate for the construction, carrying out or enforcement of . . . the judgment heretofore entered in this proceeding upon the Award by Arbitration Board No. 282 or any legal obligations resulting therefrom."

The carriers have tried assiduously to defeat the effectiveness of the condition that the District Court attached to the injunction issued in their favor. Their effort has been to urge upon the Courts at every available opportunity the contention that compliance with the Section 17 grievance procedure is a condition precedent. The carriers' contention is that each individual claim resulting from the carriers' violations and improper applications of the Award must be processed through the Section 17 grievance procedure within the time prescribed by that procedure and up to the carriers' highest officer designated to handle claims even though that officer had already rejected them. If the

claim or grievance has not by that time been satisfactorily disposed of, the next step is to submit within six months to "a tribunal having jurisdiction pursuant to law or agreement of the claim or grievance." All parties understand that phrase to refer to the First Division of the National Railroad Adjustment Board.

The claims and grievances would remain pending before the Adjustment Board, because of the First Division's congested docket, for a period of eight to ten years before they would be reached for decision. Thereafter, such claims and grievances as were sustained, the carriers could choose to disregard, as they have a right to do under the terms of the Railway Labor Act, and the employees would then have the task of trying to enforce their claims and grievances in enforcement proceedings pursuant to Section 3, First (p), of the Railway Labor Act. Such proceedings, this Court held in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville R. R. Co.*, 373 U.S. 33 (1963), to be an integral part of the Railway Labor Act's two-step grievance procedure.

If the carriers' contention were sustained, the carriers would escape virtually all responsibility for their violations and misapplications of the Arbitration Award, because the sixty-day period, following the date of the occurrence on which the claim or grievance arose, within which the Section 17 grievance procedure requires all claims and grievance be filed with the carriers' operating officers, would bar the vast majority of all claims and grievances that resulted from the enforcement of Award 282. Individual firemen were in no position to know their rights under the Award and to file written claims in a timely manner, when the parties to the Award spent months following May 7,

1964, studying the Award and arguing about it and reconvening Arbitration Board No. 282, before there developed a generally uniform understanding of the proper interpretation and application of the Award's basic provisions. And if any substantial number of the claims and grievances were in fact successfully filed within the sixty day limitation period as required by Section 17, and if they had been progressed through the full procedure prescribed by Section 17, up to the National Railroad Adjustment Board, the long years of delay that would have ensued before the adjustment Board would have reached the claims and grievances for decision, and the additional delay involved in going through the judicial enforcement proceedings, would have surely dissipated all interest and value that the claims held for the employees.

The District Court rejected several times the carriers' contention that the Section 17 grievance procedure was a compulsory and exclusive method of disposing of these firemen's claims and grievances. The Court of Appeals affirmed the District Court's authority as a court of equity to impose conditions for the protection of the employees, after having granted to the carriers' broad injunctive relief to protect them from strikes and strike threats.

That is the issue that was presented to the Courts below and was decided by those Courts. It is far removed from the question posed by the petitioner. The question posed by the petitioner is whether, after a judgment has been entered by a court on an arbitration award resulting from agreement, may employees who believe they have been deprived of employment rights to which they are entitled under the award go to the court in which the award is filed and have their claims

and grievances adjudicated by that court. Were this Court short of business, it might (or might not) be interesting for it to take up this question which has not yet arisen in the more than forty years that the Railway Labor Act has been on the books.

REASONS FOR NOT GRANTING THE WRIT

The reasons advanced by the petitioner as to why this Court should grant the petition for a writ of certiorari are purely academic arguments, in view of the fact that its "Question Presented" does not reflect the true issue in this case and the issue that was faced and decided by the Courts below. Thus petitioner's "Question" poses a hypothetical question. The question as stated by petitioner has not arisen during all the years that the arbitration provisions of the Railway Labor Act have been in effect. And since Public Law 88-108 and Arbitration Award No. 282 were unique events in the railway industry, there is little reason for assuming, as the question stated in the petition implies, that the voluntary arbitration proceedings that are likely to occur in the future under the provisions of the Railway Labor Act will precipitate a question of the kind stated in the petition for a writ of certiorari.

Most of the discussion in the petition regarding the reasons why the Court should issue a writ of certiorari is concerned with one proposition. That proposition is that, assuming that a district court enters a judgment upon an arbitration award in accordance with the provisions of Section 9, Fifth, of the Act, if the union and the employees that are parties to the Award were permitted to invoke the jurisdiction of the Court for the purpose of deciding employees' claims and grievances arising from alleged misapplications of the Award by

the carrier, that procedure would violate the "Slocum doctrine" that was established by the decisions of this Court in *Order of Railway Conductors* v. *Pitney,* 326 U.S. 561 (1946), and *Delaware, L. & Western R. R. Co.* v. *Slocum,* 339 U.S. 239 (1950), and would also be inconsistent with the federal policy that underlies the decision of this Court in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965).

That is a misdirected argument inasmuch as the District Court below declared repeatedly that it would not assume to *interpret* any provision of the Arbitration Award when granting supplemental relief to the Brotherhood and the employees it represents, pursuant to its reservation of jurisdiction in Misc. No. 41-63. The District Court consistently declared that if the Brotherhood's motions for supplemental relief disclosed that its disputes with the carriers involved issues regarding the proper interpretation of Award 282, the Court would require the parties to first have such issues resolved by presenting them to Arbitration Board No. 282.

Thereafter the Court stood ready to resolve such legal issues as the employees' claims posed, and the orders that it directed to the carrier simply commanded the carriers to comply with the Board's interpretations of the Award and to make such compensation or other amends to the employees as they were entitled to, in view of the Court's rulings on issues of law and the undisputed facts upon which the claims or grievances were based.

In each such order the District Court declared that processing of employees' claims and grievances through the Section 17 grievance procedure was not a condition

precedent to their seeking supplemental relief from the Court in the form of orders that were necessary or appropriate for the enforcement of the injunctive order of the Award "or of any legal obligation resulting therefrom." (J.A. 239).

One has but to examine the orders that were issued by the District Court, in which it overruled the carriers' defense based upon the compulsory requirements of the Section 17 grievance procedure defense, to recognize that the factual circumstance and the issue set forth in the question stated on page 2 of the petition for a writ of certiorari is not the question that the Courts below ruled upon. See, for example, the District Court's order filed September 13, 1965 (J.A. 321); and two other orders filed on April 6, 1966 (J.A. 329 and 330).

The Court below gave five reasons for affirming the District Court, each of which is founded on basic principles of equity and justice, and any one of which is sufficient to sustain its ultimate conclusion. These were:

1. On the petition of the railroads the District Court had entered an order enforcing the Award against the union, reserving jurisdiction further to enforce it against the union and the railroads. It thus had jurisdiction to enforce it against the railroads. Petition, 19a.

2. An equity court has power to impose conditions on those who seek and obtain equitable relief by way of injunction. Thus, "assuming, but by no means deciding," that the carriers are right that the claims involved here are claims for which section 17 provides a *usual* procedure, the District Court did not abuse its

discretion, in enforcing the Award against Respondent, in establishing a condition that employees have an expeditious judicial remedy if the carriers violated the Award. Petition, 19a-20a.

3. "It does not necessarily follow, as the carriers suppose, that each and every contract provision established in former years by the parties to implement work rules settled purely by agreement were applicable with full vigor to implement work rules . . . effectuated by Board 282." Petition, 22a-23a. In equity, it is not inexorable that always white is white and black is black and that there are no shades of gray.

4. "The carriers cannot fairly contest the Court's authority to establish the condition under discussion; on their claim to require the union to refrain from action violating a duty resulting from the award they could not fairly contest jurisdiction to issue an injunction on a cross-claim to require carriers to abide by their duties under the Award." Petition, 23a.

5. Even assuming that section 17 would normally apply to violations of the award by the carriers, there is sound equitable basis for not imposing such requirement here. "Concepts of exhaustion of remedies will not be pursued with remorseless logic, at least in situations not fairly contemplated when the remedies were established, when the consequence would contravene basic expectations of justice by mandating a futile . . . procedure. [Citations] In this case the carriers are in effect urging that issues fully considered at pertinent top levels of management and labor" must thereafter be pursued to lower levels. To require thereafter going to lower levels "would be a long circuit bypassing the practical and the just." Petition, 23a.

Surely it must be difficult to quarrel with any one of those reasons. And when it would require disagreement with all of them to reverse, as well as with other grounds not stated by the Court of Appeals, review by this Court would be inappropriate,—especially when the factual situation is unique,—it has never arisen before,—and is not likely to arise again.

Respectfully submitted,

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May 2, 1968